

# The Power of Strategic Discovery Practice

# Discovery in Practice

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- Routine and Fruitless

Or

- Routine and FRUITFUL

# A guide to FRUITFUL discovery practice

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- 1) WHAT ARE YOUR GOALS?
- 2) KNOW YOUR DISCOVERY STATUTE!
- 3) ASK FOR IT
- 4) MEMORIALIZE WHAT YOU HAVE
- 5) DEFENSE DISCOVERY OBLIGATIONS
- 6) SANCTIONS

# GOALS?

- **Information gathering**: collecting as much information as possible so that you can prepare for trial and avoid any surprises
- **Evidence blocking**: using discovery litigation in such a way as to prevent the prosecutor from using harmful evidence against your client at trial

# Goal: Information Gathering

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- Client is charged with distributing cocaine to a CI
- Police say they observed the client sell the drugs from an undisclosed location

# What would you want to know?

- The location of this “undisclosed location”
- Opportunity to observe
  - Distance
  - Obstructions
  - Method of observation
- A videotape?
- Reliability of informant?
- EVERYTHING!!!

# Strategically Make Your Requests!

If your goal is to **gather information**, then make a more **particularized** request:

- “I am requesting discovery in this case”
- “I am requesting a copy of all recordings compiled in this case”
- “I am requesting a copy of any videotape or audiotape of the alleged drug transaction between Mr. Client and CI on May 5, 2012”

# Goal: Evidence Blocking

- Client is charged with stabbing a man, unprovoked, in the middle of the street across from a gas station
- The c/w is the only witness to the incident and provides a vague description of his assailant
- Client is stopped by police a few blocks from the gas station and appears to be under the influence of alcohol and drugs
- C/w's description somewhat matches client
- The c/w can only say that client "might" be the man who stabbed him, adding "I'm not sure"



# What's a possible defense?

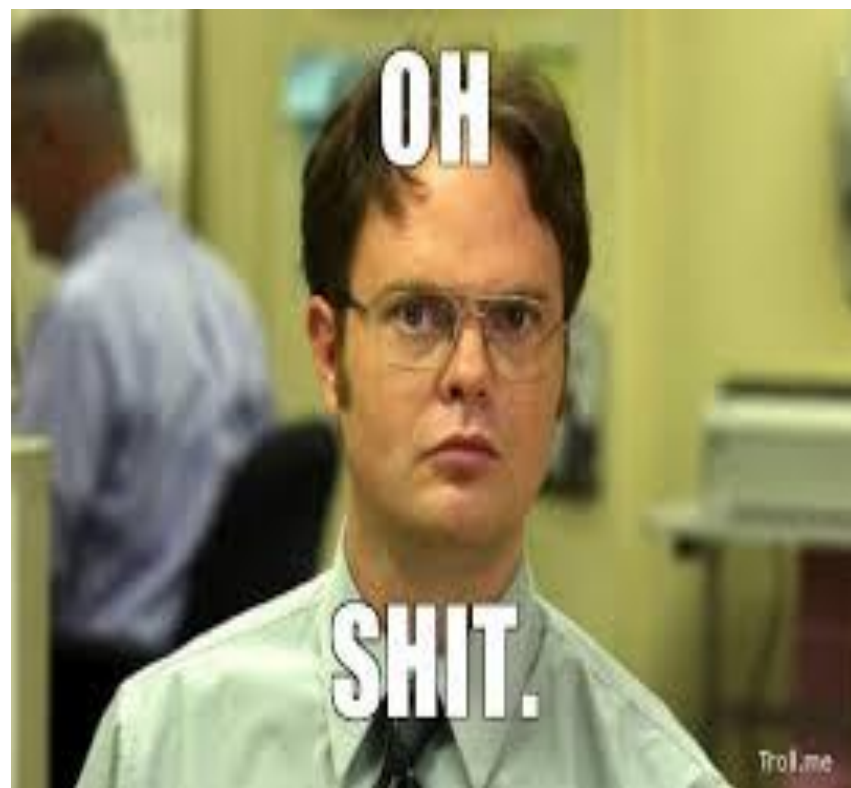
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**MIS-IDENTIFICATION!!!!**

# Investigation leads to...

- Your investigator goes to the gas station and asks to see copies of their video surveillance from the night of the incident
- Video of the outside of the gas station shows client approaching the gas station, entering the store, and then leaving shortly after
- Client is stumbling and weaving as he walks

- Video of the inside of the gas station store shows client, obviously intoxicated, behaving erratically and lifting his shirt at one point to reveal the hilt of a big knife



# Make Strategic Discovery Requests!

- If your goal is to **block evidence**, then make a more **general** request
  - “I am requesting a copy of any and all video surveillance from both the inside and outside of the gas station located next to the scene of the incident”
  - NO, NO, NO!!

- “I am requesting a copy of any audio/visual evidence collected in connection with this case, including any photographs or recordings.”
- BETTER!!
- “I am requesting a copy of any audio/visual evidence collected in connection with this case, including any photographs or recordings *that the state intends to use for any purpose at trial.*”
- BEST!!!

## Shane Goranson

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**Subject:** State v. XXXXX XXXXXXXXXXXX

Dear XXXXX,

Here is what I have received from your office in terms of discovery:

- 1) incident report (initial incident report and supplemental 3 pages, incident property report 1 page, supplemental report by Murdoch 1 page; supplemental report from Cromer, 1 page; CAD report 911 call @1734, 1 page; 1 page that looks fully redacted (what type of info was redacted?));
- 2) victim advocate contact form;
- 3) personal data report 3 pages;
- 4) warrant for csc 1st, warrant for kidnapping, victim advocate contact form;
- 5) personal data report 3 pages;
- 6) a written statement by Ms. XXXXX 3 pages;
- 7) a recorded statement from dash cam @ Hospital;
- 8) SLED tox report for Ms. XXXXXXXX;
- 9) a written statement by Ms. Williams; consent to search residence 2 pages;
- 10) Sexual Assault Examination Protocol 8pages;
- 11) NCIC report for James Hackett; Booking report XXXXX XXXXXX; the three warrants.

Are there any other written or recorded statements that you have? Was any evidence gathered from any cell phones, tablets, or computers? Was any evidence gathered from social media (facebook, snapchat, instagram) or dating sites (tinder, bumble, plenty of fish, etc)?

If I do not hear back from you within ten days then I will assume that there is nothing else other than what I have listed 1-15 and prepare for trial accordingly.

# PREPARE, PREPARE, PREPARE!





# Step 1: Know your discovery statute!

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- Discovery statutes can vary widely from jurisdiction to jurisdiction
  - Prosecutor's obligations to the defense
  - Defense obligations to the prosecution

# Statements

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- Your client is charged with aggravated assault for the unprovoked stabbing
- The police tell you that when they first approached your client, he blurted out, “I didn’t do anything, I didn’t stab anyone.”

# What is discoverable in your state?

- In GA, LA, MI, TN and SC, the state is required to disclose *any oral statement made in response to interrogation* if the state intends to use it at trial
- In PA, the state must disclose the substance of *any* statement of the defendant in its possession

# Step Two: Ask for It!

- The discovery process is triggered by a defense request
- Once discovery is requested and the prosecution complies, there is a reciprocal obligation on the defense to provide certain discovery as well

# Step 3: Memorialize what you have

- It's important to make a record of what you've gotten, what you've asked for, and what you've relied on
- Knowing your discovery rules will help you to think strategically about how to *word* your discovery requests

Rule 5/Brady	4.5.18
2526 Montague Ave 911	7.26.18
XXX + SLED + <u>Tox</u>	7.26.18
XXXX <u>XXXX</u> XXXXXXXX.pdf - Inc rep 3 pages - Inc prop report 1 page - Supplemental report by XXXXX 1page - Supplemental report by XXXXX 1 page - Victim advocate contact form - Personal data report 3 pages - Warrant for <u>csc</u> 1st - Warrant for kidnapping - Victim advocate contact form - Written statement by Ms. XXXXXX 3 pages - SLED <u>tox</u> report for Ms. XXXXX 3 pages - Sex assault examination protocol 8 pages - NCIC report for XXXXXX 8 pages - Booking report 2 pages	7.26.18

# Sample discovery letter

- I am writing, pursuant to Rule 5 SCRCrimP, to memorialize my understanding of the discovery afforded thus far and to request additional discoverable material.... Please let me know if my understanding of the information I have received thus far conflicts with yours in any way.
- I would appreciate a response to this letter by close of business on xx/xx/xxxx. **If I have not heard from you by that date I will assume all representations made in this letter are accurate and will file Motions accordingly.**

Dear XXXXXX, |

To date I have received the following in response to our rule 5/brady request:

- 1) incident report (initial incident report and supplemental 3 pages,
- 2) incident property report 1 page, supplemental report by Murdoch 1 page;
- 3) supplemental report from Cromer, 1 page;
- 4) CAD report 911 call @1734, 1 page; 1 page that looks fully redacted (what type of info was redacted?);
- 5) warrant for csc 1st, warrant for kidnapping;
- 6) warrant for DVHAN;
- 7) a written statement by Ms. XXXXXX 3pages;
- 8) a recorded statement from dash cam @ Self;
- 9) SAP billing claim form; Sexual Assault Examination Protocol 8pages;
- 10) NCIC report for XXXXXXXXXXXX;
- 11) Booking report XXXXXXXXXXXX

Are there any other written or recorded statements that the state intends to use for any purpose at trial?

Are there any pictures that the state intends to use for any purpose at trial?

Is there any evidence gathered from cell phones or computers? Is there any evidence gathered from the various social media/networking sites/apps that the state intends to use at trial?

If I do not hear back from you within 10 days I will assume there is no other evidence in this case and prepare for trial accordingly.



# Building RELIANCE in!!

- If you can show the judge that:
  - (1) you made a timely discovery request
  - (2) that you gave the government ample time to respond and/or correct your understanding
  - (3) the government never responded and you therefore RELIED on their representations about what existed and what did not...

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# Be strategic! Be creative!

- U.S. v. Cole, 857 F.2d 971 (4<sup>th</sup> Cir. 1988)
  - Discovery rule in that jurisdiction only allowed statements made to law enforcement
  - Defense attorney asked for “all statements made by the defendant that the government intends to use at trial”
  - The prosecutor responded that there were no statements made

- A smart prosecutor would have responded that there were “no statements made that are discoverable under the statute”
- At trial, the defense attorney objected to introduction of the statement on DUE PROCESS grounds, arguing she had RELIED on the prosecutor’s representation that there were no statements by the client

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- 11) booking report XXXXXXXXXXXX

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**OMG!**



# Step 4: Think Strategically about Defense Discovery Obligations

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- *Know what you have to turn over!!*
- Rare case where what you have to turn over results in opt out.



# Step 5: Sanctions

- It's important that you be **able to claim compliance** with the rule and due diligence
- Request discovery as early as possible
- **Follow-up** on your requests and continue to pursue discovery
- **Memorialize** all your discovery requests as well as all representations made by the prosecutor about their compliance

# Prejudice

- Think carefully about the PREJUDICE you suffer from the non-disclosure
- What would you have done differently?
- Would you have pursued different investigative leads?
- Would you have considered alternative defense theories?

# Preserving the Record

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- Motion to Compel
  - Mark exhibits
  - Make them a part of the record
  - Refer to the exhibits
  - Timeline to include exhibits.